COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2013-SC-685

NISSAN MOTOR COMPANY, LTD. AND
NISSAN NORTH AMERICA, INC. — APPELLANTS

v.

APPEAL FROM KENTUCKY COURT OF APPEALS
No. 2012-CA-952

APPEAL FROM LINCOLN CIRCUIT COURT
CIVIL ACTION NO. 2010-CI-82

AMANDA MADDOX — APPELLEE

BRIEF FOR APPELLANTS

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Certificate of Service

I hereby certify that a copy of the foregoing was sent by U.S. first class mail October 13, 2014 to: Hon. David Tapp, Judge, Lincoln Circuit Court, 100 E. Main Street, Stanford, KY 40484; Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Richard Hay, Sarah Hay Knight, Law Office of Richard Hay, 203 W. Columbia St., P.O. Box 1124, Somerset, KY 42502-1124, and J. Paul Long, Jr., 324 W. Main St., P.O. Box 85, Stanford, KY 40484-0085.

Bethany A. Breetz

INTRODUCTION

After being injured in a severe head-on collision with a drunk driver on the wrong side of the road, Amanda Maddox sued Nissan claiming the front passenger restraint system in her 2001 Pathfinder was defectively designed and inadequately tested. A jury rendered a verdict in Amanda's favor—even though the Pathfinder's occupant restraint system complied with all federally mandated safety regulations and earned the government's highest possible voluntary safety rating—and the verdict was confirmed by both the trial court and a Court of Appeals' panel, both of which implausibly and incorrectly decided that designing a restraint system to achieve the highest possible federal government safety rating was evidence of "trickery or deceit" warranting punitive damages of $2.5 million.

STATEMENT CONCERNING ORAL ARGUMENT

Nissan believes that oral argument would aid the court.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

A. Drunk driver on the wrong side of the road hits Nissan Pathfinder head-on

In June 2009, Edward Sapp caused an accident by driving drunk on the wrong side of U.S. Highway 127. Sapp struck head-on a 2001 Nissan Pathfinder occupied by Dwayne and Amanda Maddox, and the violent collision caused severe damage to both vehicles. (VR 12/12/11 at 14:59:52-50:40; Def. Exh. 47.) The Pathfinder's estimated Delta V, or change in velocity in the frontal crash, was between 38 and 41 miles per hour, easily enough kinetic energy to cause occupant death.[1] (VR 12/5/11 at 16:32:17-32:40; 12/12/11 at 11:14:43-16:40.) In addition, a second vehicle traveling behind the Pathfinder was unable to stop and rear-ended the Maddoxes' vehicle. (VR 12/12/11 at 14:49:52-50:07.)

Sapp died in the crash. The occupants of the Pathfinder, driver Dwayne Maddox and his wife, Amanda, survived. Passersby quickly helped Dwayne out of the vehicle. At the Danville hospital, doctors found damage to all the bones and cartilage in Dwayne's heel. (VR 12/6/11 at 10:53:15-53:49.) He also had "marks from his seat belt" such that, after the severe pain from his foot subsided, he began feeling chest pain and was diagnosed with rib injuries. (*Id.* at 10:56:06-57:40.)

According to the first people at the crash scene—a nurse passing by, emergency paramedics, and a Kentucky State Trooper—Amanda was still in the front passenger seat and still wearing her seat belt. Both front airbags in the Pathfinder properly deployed. Amanda's car seat was upright and she was close to a normal seated position; *i.e.*, she

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[1] A study released the same year as this accident reported a 50% fatality rate for collisions with a Delta V of 34 mph. *See* D. Richards, R. Cuerden, "The Relationship Between Speed and Car Driver Injury Severity," Transp. Research Lab., April 2009.

was against the seat back, with her buttocks on the seat cushion, and she was neither crumpled down nor on the floorboard. Amanda's legs, however, were jammed into the instrument panel.[2] (VR 12/6/11 at 17:36:49-37:22, 17:42:27-43:20; VR 12/8/11 at 15:42:56-43:23; 12/12/11 at 14:20:06-20:56 and 14:36:21-36:68.) Later, Amanda remembered neither the accident nor her husband getting out of the car. Nevertheless, Amanda volunteered at trial, without a question on point, that she "guessed" she was not in her seat but on the floorboard.[3]

After a portion of the Pathfinder was cut away to free Amanda from the vehicle, she was taken to UK Hospital. (VR 12/6/11 at 17:38:37-39:08; 12/8 at 15:44:52-46:46; 12/12/11 at 14:18:46-19:29.) Amanda's medical history at the time included chronic obesity and gastric bypass surgery to achieve weight loss.[4] Her injuries in the accident included a rupture of the gastric bypass, fractures of her breastbone, ribs, spine, right femur, and left wrist, a dislocated right hip, and pulmonary contusions. (VR 12/7/11 at 16:11:15-11:58.) Medical testimony established that Amanda was vulnerable to blunt force trauma to the abdomen because of her gastric surgery. (*Id.* at 16:47:08-48:23.)

Paramedics on the scene were not surprised, given the severity of the crash, that one person died and another was severely injured. (VR 12/12/11 at 14:23:04-23:33.)

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[2] Brenda Mullins, the nurse, and the paramedics and Kentucky State trooper disagreed as to whether Amanda's legs were crossed. (VR 12/6/11 at 17:37:58-:38:00 (Mullins); 12/8/11 at 15:42:56-43:18 (Ruhe); VR 12/12/11 at 14:20:27-21:04 (Laruch), 14:36:21-36:38 (Wren).)

[3] "A: I don't – I wouldn't even – I don't – to my memory, I wasn't in the seat, so . . . Q: You weren't in the seat? A: Because I was looking up at the other seat. Q: And where were you? On the floorboard? A: Yes. Q: Just laying on the floorboard? A: I – I guess. Q: Hmm. Okay . . ." (VR 12/8/11 at 14:49:30-50:00.)

[4] Both Dwayne and Amanda had gastric bypass surgery to help them lose weight. Following his surgery, Dwayne went from about 330 pounds to about 170 pounds at the time of the crash. (VR 12/8/11 at 14:35:59-36:30.) Following her surgery, Amanda's weight went from 364 pounds to about 240 pounds at the time of the crash. (*Id.* at 11:52:34-53:26.)

B. Nissan sued for product defect, negligence, and failure to warn

In February 2010, Amanda and Dwayne Maddox filed suit against Nissan Motor Co. Ltd. and Nissan North America, respectively the designer/manufacturer and distributor of the Pathfinder, as well as the Estate of Edward Sapp.[5] (TR 1.) As to Nissan, they alleged that the occupant restraint system in the Pathfinder was "defectively designed, tested or manufactured" and that Nissan failed to warn the public, including Amanda, of the "defective and dangerous condition" of the restraint system. (*Id.* at ¶¶ 20-24, 29.)

C. Federal motor vehicle safety testing

The 2001 Pathfinder met or exceeded all Federal Motor Vehicle Safety Standards (FMVSS), including Standard 208 governing occupant crash protection. (VR 12/13/11 at 12:15:00-15:59; 12/14/11 at 10:46:24-46:32.) Although compliance with FMVSS is mandated by law (49 CFR § 571.208), in 2001 a car manufacturer could also submit vehicles for voluntary testing under the New Car Assessment Program (NCAP).[6] While FMVSS 208 testing is done at 30 miles per hour, NCAP test protocols use a more rigorous 35 miles per hour.[7] (VR 12/7/11 at 11:40:25-41:20.) The federal government crash-tested the 2001 Pathfinder using NCAP's higher speed, and the vehicle's frontal

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[5] Before trial, the Maddoxes divorced and Dwayne Maddox's claim was dismissed. (TR 1948.) Amanda remarried, taking the name Gifford, but is referred to here as "Maddox." (VR 12/8/11 at 11:21:09-51:44.)

[6] The National Highway Transportation Safety Administration (NHTSA) began NCAP in 1986. The program allows manufacturers to request a test (or retest) of a particular model vehicle based on design improvements or introduction of innovative safety features. The manufacturer pays the cost of testing controlled by NHTSA at approved test sites. *See generally* L. Hershman, "The New Car Assessment Program (NCAP): Past, Present, and Future," U.S. NHTSA, Paper Number 390.

[7] NCAP's higher speed tests are more rigorous because the kinetic energy generated by a crash increases with the *square* of the velocity, *i.e.*, $E_k = \frac{1}{2}mv^2$. Mathematically, therefore, a 5 mph increase in speed increases the kinetic energy by one-third.

impact, right front passenger, safety performance received the highest possible consumer rating of five stars out of five. (VR 12/6/11 at 16:55:16-55:25; 12/7/11 at 13:01:02-:01:59; 12/13/11 at 12:15:10-17:16; 12/13/11 at 10:58:26-59:13.)

Except when the occupant safety of children is being evaluated, vehicles tested in 2001 to either FMVSS 208 or NCAP's frontal impact test protocols were *required* to use the 50th percentile adult male crash test dummy. 49 CFR § 571.208, S5. Use of a 50th percentile dummy mathematically insured the widest possible applicability to the population as a whole without testing for every potential occupant size, *i.e.,* one-half of the population weighs more than the test dummy and one-half of the population weighs less.

At the time of the accident, Dwayne Maddox weighed 170 lbs., which happens to be virtually the same weight as the 171-pound 50th percentile test dummy required by Standard 208 and NCAP's frontal impact test protocol. Amanda, however, weighed 240 lbs., putting her at or above the 95th percentile in weight. (VR 12/14/11 at 15:21:33-22:26.)

D. NCAP occupant protection testing: "More Stars Equal Safer Cars"

In 2001, using NCAP's higher-speed tests, vehicles were comparatively rated by NHTSA on a 5-Star Safety Rating System.[8] (*See* www.safercar.gov/Safety+Ratings [last accessed Oct. 6, 2014.]) As the federal government's website still says today: "5-Star Safety Ratings: More Stars. Safer Cars." (*Id.*)

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[8] Starting in 1994, NHTSA changed the NCAP test results from a numerical format to an easier-to-understand five-star rating system. L. Hershman, "The New Car Assessment Program (NCAP): Past, Present, and Future," *supra,* at 2.

With an NCAP frontal impact protection rating of five stars for the right front passenger, the 2001 Pathfinder performed as expected in this accident. Both front airbags properly deployed. (VR 12/6/11 at 10:51:49-51:54.) The pretensioners in both front seat belt retractors fired properly. (*Id.* at 15:34:07-34:15.) Amanda's seat belt was equipped with a load limiter that operated to control the payout of webbing into the shoulder belt against the dynamic load created by Amanda's body. (*Id.* at 15:43:42-45:57.)

Load limiters to control seat belt payout became more common in the late 1990s and early 2000s, and today the vast majority of passenger cars on the road are equipped with various forms of these energy absorption devices. Load limiters of the type in Amanda's Pathfinder help moderate the high chest loads that seat belts can impart during frontal crashes. In this particular crash, the front seat load limiters activated because of the rapid deceleration (the high Delta-V), which is a result of the speed of the Pathfinder and of the drunk driver's car, and, in Amanda's case, the higher weight of her body increased the seat belt payout. (*Id.* at 15:45:04-45:34.)

The National Highway Transportation Safety Administration (NHTSA) views load limiters as effective in lessening chest and thoracic injuries in frontal crashes. (VR 12/7/11 at 12:29:09-40:54.) In severe frontal collisions, the seat belts are designed to keep passengers in their seats, instead of being thrown into the windshield or thrown from the car, but the belts themselves can cause chest injuries. Load limiters are designed to moderate the potential for chest injuries that a completely unyielding seat belt can cause. Like all restraint systems at the time, the 2001 Pathfinder's design represented a series of tradeoffs between too much restraint and too little, with the goal the prevention

of injuries most likely to be fatal. (*See* 12/6/11 at 15:02:52-04:03, 15:09:13-09:59, 15:48:27-49:27; 12/7/11 at 12:36-48-37:18, 12:40:34-40:54.)

Extensive frontal crash testing by both Nissan and NHTSA, along with substantial usage experience, revealed no safety problems with the 2001 Pathfinder's load limiter, seat belt, seat belt webbing payout, or any other part of the occupant restraint system. (VR 12/6/11 at 14:59:43-15:00:30; 12/13/11 at 13:23:00-27:36.) Significantly, the 2001 Pathfinder has not been subject to any recalls or NHTSA investigations related to its occupant restraint system (VR 12/6/11 at 14:58:39-58:59, 14:59:43-15:00:30.), and no evidence at trial established *any* substantially similar accidents like Amanda's.

E. Nissan seeks summary judgment on punitive damages due to lack of evidence of gross negligence.

Due to the lack of evidence of gross negligence, Nissan sought summary judgment on punitive damages. (TR 925, 823-92, 1853-56.) The Pathfinder's combination of seat belts, airbags, and other features saved the lives of Amanda and her husband, and Amanda's own witness could not identify a similar model vehicle that would have prevented Amanda's severe injuries. (TR 823 at pp. 3, 9, citing Exh. C at 149-50, and Exh. F at 60-62.) A vehicle's safety configuration must take into account the widest variety of passengers and the broadest array of accident scenarios possible. (TR 823 at p. 9, citing Exh. D at 54.) A design that might have reduced some of Amanda's injuries would likely have increased her chest injuries and may have put a larger portion of the population at risk. (TR 823 at Exh. D at 54.)

The various claims by Amanda's witnesses that the Pathfinder's occupant restraint somehow could have been designed differently to prevent her specific injuries so not constitute evidence of reckless or outrageous conduct. On the contrary, Nissan's

success in meeting and exceeding all government standards demonstrated genuine concern for occupant safety. (TR 823 at pp. 8-9.)

Nevertheless, the trial court denied Nissan's motion for summary judgment on punitive damages. (TR 1942; Appx. 1.)

F. Maddox's Theme: "Stars Over Safety"

At trial and on appeal, Amanda argued that her injuries were more severe than Dwayne's because the front seat restraint system was designed for optimal performance for the 50th percentile population. (VR at 12/14/11 at 14:40:05-40:33, 14:42:20-45:12.)

Even though government safety testing requires using a 50th percentile male dummy, Amanda made every effort to neutralize the Pathfinder's NCAP safety rating by turning the federal government program upside down and calling it "stars over safety." (VR 12/15/11 at 09:40:20-44:23, 14:43:55-14:46:53.) With this rhetoric, Amanda convinced the jury that Nissan's five star occupant safety score somehow evidenced defective design. In other words, Nissan's "gross negligence" was designing an occupant restraint system aimed at the statistical middle of the Bell curve and testing that system using the government's mandatory test protocol. Amanda used as evidence of product defect the fact that the 2001 Pathfinder achieved the highest possible score in NCAP's frontal impact crash test. Even though FMVSS 208 and NCAP's test protocol *required* the use of 50th percentile male test dummies, Amanda contended throughout trial that designing and testing an occupant restraint system as required by federal regulations was improper. (VR 12/8/11 at 15:09:06-16:35; 12/15/11 at 14:25:30-25:16.)

Amanda's claim against Nissan necessarily relied on a crashworthiness theory, that is, liability based on an alleged enhancement of injury caused during an accident instead of the accident itself. (VR 12/15/11 at 11:46:33-51:45.) The central issue,

therefore, was not whether alleged defects in the Pathfinder caused the violent head-on crash—obviously they did not—but whether the Pathfinder's federal program five-star occupant protection system was defective and unreasonably dangerous because it did not prevent serious injury in this specific crash to a 240-lb. woman in the front passenger seat.

At trial, Amanda's witnesses agreed that the seat belt load limiters in the 2001 Pathfinder were designed to—and did—payout webbing into the shoulder belt to reduce injury-producing forces on the occupant's chest. (VR 12/6/11 at 15:45:34-47:25; 12/7/11 at 12:35:54-36:21.) Her witnesses also agreed that load limiters were a legitimate way to absorb energy and lessen chest loads in frontal crashes and that, at the time the 2001 Pathfinder was designed and assembled, load limiters were fast becoming standard equipment on all passenger vehicles. (VR 12/6/11 at 15:45:57-47:25.) Amanda's witnesses agreed that by lessening chest loads, load limiters helped to protect older adults—an expanding segment of the population—from severe, even life-threatening, chest injuries. (*Id.* at 15:02-52-04:03, 15:09:13-09:59.) But Amanda's witnesses also criticized the amount of belt payout in Nissan's load limiter as failing to adequately protect a woman whose body weight put her in the 95th percentile—even as they conceded that the higher forces exerted on Amanda's chest without the load limiter likely would have caused even more severe chest injury. (VR 12/7/11 at 13:27:56-28:32.) In other words, although less payout may have improved her abdominal injuries, the likely consequence was more severe chest injuries.

Amanda's witnesses also criticized the use of a pass-through latch plate, a nearly universal feature in all U. S. passenger cars, which allegedly allowed webbing to transfer

from the shoulder belt into the lap belt. (VR 12/6/11 at 12:43:22-44:00.) And for good measure, Amanda's witnesses also criticized the design of the Pathfinder's seat pan, alleged insufficiencies in the knee bolsters, and alleged "submarining" of Amanda's body under her lap belt. (VR 12/6/11 at 12:45:29-45:37, 16:00:16-00:57, 16:02:02-02:24.)

Although Amanda offered some evidence regarding alternative seat belt, latch plate, and seat pan designs, she did not introduce any evidence demonstrating: (1) how, or whether, different components would or could have made *her* restraint system safer; (2) the difference in *her* injuries if different components had been used; or, (3) how Nissan's design enhanced *her* injuries.

Amanda's witnesses also could not point to any similar vehicle that would have performed better than the 2001 Pathfinder in this particular crash. (VR 12/6/11 at 15:37:01-27:12; 12/7/11 at 13:32:20-33:30.) Instead, Amanda's evidence of product defect focused on Dwayne's comparatively fewer injuries than Amanda's. (VR 12/7/11 at 12:14:00-14:41.) In short, because both FMVSS 208 and NCAP's occupant protection testing protocols mandated the use of a 50th percentile male dummy, Amanda argued that by failing to design for—or warn against use by—a passenger in the 95th percentile of the female population, Nissan put "stars over safety."

G. General Motors recall

Despite a motion *in limine* to exclude the evidence, pre-trial objections to plaintiff's exhibits, and timely objections at trial, a witness for Amanda Maddox was allowed to read to the jury the language of a 1997 General Motors recall of a sub-set of sport-utility vehicles employing a stitched-in, "energy absorbing" loop—a seat belt loop *not* present in the 2001 Pathfinder. (TR 652 at p. 18; TR 1612 at pp. 1-6; VR 12/6/11 at 13:21:24-22:56.) The GM recall occurred after Amanda's 2001 Pathfinder was made and

sold. According to GM, "the free sliding latch plate used in this [1997] system may allow webbing to dynamically distribute between the lap and shoulder belt as the driver's position changes during a multiple rollover event."

Amanda did not attempt to show that GM's seat belt system was the same as or substantially similar to Nissan's, or that her crash was in any way similar to a "multiple rollover event" described in the GM recall. (TR 1612 at pp. 1-6.) Instead, Amanda relied on numerical similarity in the *amount* of the seatbelt payout. The fact that "General Motors performed [a recall] where they had an energy management system that released 10 inches of belt in a crash" (VR 12/6/11 at 13:15:49-15:59) became a false standard of care.

After allowing GM's recall into evidence, the trial court announced to the jury that GM's recall could be considered as evidence of whether the 2001 Pathfinder was "defective" or posed "a particular danger." (*Id.* at 13:20:00-20:39.) Amanda's counsel thereafter argued in closing that GM's recall set the standard for Nissan: "When General Motors found that its energy-absorbing loop, which is a load-limiter type thing when it was letting ten inches of belt payout, what did General Motors do? It recalled the vehicle." (VR 12/5/11 at 14:30:58-31:11.)

H. Motion for directed verdict and jury instructions

At the close of Amanda's evidence, Nissan moved for directed verdict on all Amanda's claims, including on punitive damages. (VR 12/8/11 at 14:56:06-56:28.) When asked by the trial court for evidence in the record that would meet a "clear and convincing standard" of proof, Amanda argued that punitive damages were warranted because of a lack of front crash testing for a person in the 95th percentile (although other

testing for 95th percentile dummies was performed[9]) and because other manufacturers used designs different from Nissan's. (*Id.* at 14:57:26-15:00:18.) Amanda did not produce any evidence demonstrating any conscious disregard of any known problem or any other culpable state of mind. (*Id.*) The trial court denied Nissan's motions for directed verdict on all of Amanda's claims except for punitive damages, reserving judgment on the latter. (*Id.* at 15:30:10-30:34.)

At the close of all the evidence, Nissan renewed its motion for directed verdict and furnished the court with a supporting memorandum. (VR 12/14/11 at 17:14:52-15:00; TR 2347-77.) Nissan reiterated that the Pathfinder met and exceeded all safety standards and that Amanda had no evidence to justify punitive damages. (VR 12/15/11 at 9:27:37-36:24; TR 2347 at pp. 22-28.) Amanda's "evidence" that allegedly entitled her to punitive damages was nothing more than a disagreement over how to design a product and the design trade-offs inherent in the process, given that no car can prevent all injuries to all occupants in all circumstances. Amanda presented evidence that other designs might have prevented her specific injuries in her specific crash but not that the Pathfinder's design was "unreasonably dangerous" to any occupant. As a matter of law,

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[9] While the Pathfinder was not crash tested using a 95th percentile dummy, it was sled tested using a 95th percentile dummy. A sled test is a dynamic test of the integrity of the seat belt. (VR 12/13/11 at 12:32:25-33:26.) Seats and seat belts from the Pathfinder are used in this testing. (*Id.*) A 95th percentile sled test was performed at an impact of frontal 35 miles per hour to confirm the integrity of the seat belt. (*Id.* at 12:33:54-35:22.) Both a 50th percentile dummy and 95th percentile dummy were used in this test to test both driver and a front-right passenger seats and seat belts. (*Id.* at 12:38:12-39:16.) This sled test was completed for the seat belt on the 2001 Pathfinder and resulted in testing without any issues, including the testing of loads measured on the shoulder belt and lap belt. (*Id.* at 13:23:00-23:56; 13:37:48-38:28.) The dynamic seat belt test, or sled test, is a requirement in Europe that tests the entire seat belt system as a whole, load limiter included, and that focuses on occupant movement rather than seat belt payout. (*Id.* at 16:39:07-16:48.) The record contains no evidence that any other manufacturers ever perform high speed frontal crash tests with 95th percentile dummies.

a design is not "unreasonably dangerous" if it protects the greatest number of occupants in the greatest number of accidents.

The trial court believed that "Kentucky jurisprudence basically says, 'Judge, don't you dare get rid of even, you know, something that's barely colorable." (VR 12/15/11 at 9:33:26-33:35.) Nevertheless, the trial court indicated that a "big issue for me, quite frankly, is punitives." The judge wondered aloud whether giving a punitive instruction would be "no harm, no foul" if the jury did not return a punitive award or, if the jury did return a punitive award, "if the Court muses on this a this a little bit more and finds your argument persuasive and vacates that portion of the award." (*Id.* at 9:35:12-35:45; 9:40:16-40:21.) Nissan's counsel pointed out that letting jurors consider punitive damages if the evidence did not warrant the claim was *not* "no harm, no foul." (*Id.* at 9:35:45-36:22.)

Once again, the only "evidence" allegedly warranting punitive damages advanced by Amanda was that (1) Nissan designed the Pathfinder to get five stars; (2) Dwayne, who was at the 50th percentile, walked away with minor injuries; (3) the seat belt allegedly paid out too much; (4) load limiters must not be as important as Nissan claims or they would be installed in the back seat; and (5) although the Nissan Pathfinder was *load or sled* tested with a 95th percentile dummy, it was not *crash* tested with a 95th percentile dummy. (*Id.* at 9:40:20-44:23; VR 12/13/11 at 13:23:00-30:18, 16:26:36-28:27.) In other words, lacking evidence of gross negligence, plaintiff pressed her liability evidence into performing double duty and pointed to her "stars over safety" argument as a reason to submit the punitive damage claim to the jury.

The trial court denied Nissan's motion for directed verdict, even though it "struggled with [punitive damages] some, and continue to struggle." (VR 12/15/11 at 9:48:23-48:45.) The court was not yet ready to make a decision on punitive damages, stating that it would "muse over that a little bit." (*Id* at 9:49:05-49:08.) The court also again indicated that, if it gave a punitive damages instruction but the jury did not return a punitive damages award, it would be a "moot issue," or, it would also have the "option of setting that portion of the verdict aside." (*Id* at 9:48:45-49:05.)

After hearing argument on the motion for directed verdict, the court heard arguments on jury instructions, during which Nissan objected to giving a punitive damages instruction to the jury. (*Id.* at 11:45:13-12:04:47.) Without explicitly ruling on Nissan's motion for directed verdict on punitive damages, the court nevertheless instructed the jury on punitive damages. (*Id.* at 12:27:58-12:31:50; TR 2403.)

Because of the faulty instructions and other errors, including the evidence of the GM recall, the jury found Nissan liable for product defect and failure to warn, the liability theories submitted by the plaintiff. The jury awarded Amanda $3.68 million in compensatory damages, of which 70% was apportioned against Nissan and only 30% against the estate of the drunk driver who, while on the wrong side of the road, ran head-on into Amanda's vehicle. (Appx. 2.)

Most importantly for this appeal, the jury penalized Nissan with punitive damages of $2.5 million.

The trial court denied all of Nissan's post-trial motions for a new trial and to alter, amend, or vacate. (TR 2347, 2497, 2538, 2721, 2735, 2757; Appx. 3.) Regarding punitive damages, the trial court found that a "punitive damages instruction was proper,"

apparently because it had found "no case or statute which instructs otherwise." (TR 2757 (Appx. 3) at 14.) It then held that the amount of punitive damages bore a reasonable ratio to the compensatory award and performed a "first-blush" review to determine that the punitive damage award was not "excessive." (*Id.* at 14-15.) The trial court did not evaluate whether Maddox furnished actual evidence of reprehensible and outrageous conduct as required by both Kentucky law and the United States Constitution.

I. Proceedings in the Court of Appeals.

With one dissent on punitive damages, a panel of the Court of Appeals affirmed the jury's verdict in a To Be Published opinion rendered August 30, 2013. (Appx. 4.) Despite this Court's opinion in *Toyota Motor Corp. v. Gregory*,136 S.W.3d 35 (Ky. 2004), setting forth the required elements in a crashworthiness case, the Court of Appeals held that instruction on all three elements are "not required," thereby continuing the disparate treatment of crashworthiness cases in Kentucky courts. (Opinion at 15; Nissan Brief to Court of Appeals at 16-20.) In addition, although no reported decision in any jurisdiction recognizes or approves of using a different manufacturer's recall of a different product with a different design as evidence of a defective condition in the product at issue, the intermediate court rationalized the recall evidence as not "unduly prejudicial," thereby setting Kentucky apart from every jurisdiction on the use of recall evidence. (Opinion at 16-17 (listing cases concerning the recall of another product from the *same* manufacturer); Nissan Brief to Court of Appeals at 11-13.) The opinion also changes Kentucky law in holding that "thorough cross-examination" of fundamentally inadmissible and highly prejudicial evidence can render the evidence harmless. (Opinion at 20.)

Finally, in a finding not supported by the trial record, the Court of Appeals let stand the punitive damages award by holding that "a reasonable inference" could be made that Nissan "utilized trickery or deceit by designing the vehicle for the safety of a crash test dummy of average size and not for foreseeably heavier passengers." (Opinion at 23.) With these words, the Court of Appeals swept away Kentucky's requirement for "clear and convincing evidence" of gross negligence. Instead, under the majority opinion, punitive damages would now be available if a provably safe product with the highest obtainable federal government safety rating cannot physically meet every user's needs in every imaginable circumstance. Incredibly, a majority found this evidence sufficient to create a "reasonable inference" of gross misconduct.

One judge dissented as to the punitive damages award because Amanda "presented insufficient evidence to justify submitting the issue of punitive damages to the jury." (Opinion at 25, Maze, J. dissenting.) When gross negligence is the basis for punitive damages, clear and convincing evidence must demonstrate a wanton or reckless disregard for the rights of others. (*Id.* at 26-27.) Although Amanda claimed that Nissan knew that its seat belt design "placed occupants heavier than 171 pounds at risk," the dissent found "no evidence to support this conclusion." (*Id.* at 29.) Rather, Nissan's compliance with federal regulations and additional voluntary safety standards shows that it exercised at least slight care under the circumstances." (*Id.*)

Nissan sought discretionary review of the Court of Appeals opinion on the issues raised above. This Court granted discretionary review regarding punitive damages only.

ARGUMENT

A. Kentucky law allows punitive damages only for outrageous conduct or a wanton disregard for others.

Under Kentucky law, punitive damages may not be awarded for "ordinary negligence" but only for "gross negligence," meaning a "wanton or reckless disregard for the safety of other persons." *Kinney v. Butcher,* 131 S.W.3d 357, 359 (Ky. App. 2004), quoting *Phelps v. Louisville Water Co.,* 103 S.W.3d 46, 52 (Ky. 2003). "[G]ross negligence is "something more than the failure to exercise slight care . . . there must be an element either of malice or willfulness or such an utter and wanton disregard of the rights of others as from which it may be assumed the act was malicious or willful." *Cooper v. Barth*, 464 S.W.2d 233, 234 (Ky. 1971). While a finding of "express malice" is not necessary, the "course of conduct" at issue must "be so outrageous that malice can be implied from the facts of the situation." *Kinney,* 131 S.W.3d at 359, citing *Phelps,* 103 S.W.3d at 52. *See also City of Middlesboro v. Brown,* 63 S.W.3d 179, 181 (Ky. 2001) ("there must be an element either of malice or willfulness or such an utter and wanton disregard of the rights of others from which it may be assumed the act was malicious or willful.")

Punitive damages are "reserved for truly gross negligence," such as when the defendant is driving drunk (like Edward Sapp), *Shortridge v. Rice*, 929 S.W.2d 194 (Ky. App. 2003), or when evidence is presented of a course of conduct "evidenc[ing] a conscious disregard for public safety." *Kinney*, 131 S.W.3d at 359, citing *Phelps*, 103 S.W.3d 46. (*Phelps* held that a punitive damages instruction was warranted where, along with other misconduct, the Louisville Water Company misrepresented the dangerous

nature of a highway condition, violated its own safety policies, and disregarded the Manual on Uniform Traffic Control Devices.)

Except for Edward Sapp's drunken driving on the wrong side of the road, here there is no evidence of a wanton or reckless disregard for the safety of others, of malice or willfulness, or of a course of conduct demonstrating a conscious disregard for public safety. On the contrary, Nissan went the extra distance to make the Pathfinder safe and obtain NHTSA's highest possible safety rating. The evidence is undisputed that:

- the 2001 Pathfinder met or exceeded all applicable U.S. government safety standards, both mandatory FMVSS and the more stringent voluntary NCAP standards;
- load limiters are a recognized way to absorb energy and lessen chest loads in frontal crashes and are standard equipment in passenger vehicles;
- the 2001 Pathfinder was not subject to any recalls or government safety investigations related to its occupant restraint system; and
- there were no similar claims or suits involving the Pathfinder, nothing to alert Nissan to any alleged performance issues with the Pathfinder's restraint system.

In other words, the record contains **no** explicit or implicit evidence, let alone clear and convincing evidence, of malice or wanton disregard of the rights of others.

Lacking evidence of gross negligence, plaintiff pressed her liability evidence into double duty. (TR 2379 at p. 8 and TR 2614 at p. 8, citing webbing payout, purported lack of testing for heavier persons, seat pan design, and lack of a load limiter in the back seat.[10]) While Nissan disputes that it was negligent, at most plaintiff demonstrated "ordinary" rather than "gross" negligence. Amanda pointed to her "stars over safety"

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[10] Evidence demonstrated that, in addition to the back seat being the safest place in a car, load limiters work in conjunction with air bags, and the back seat of a 2001 Pathfinder did not have airbags. (*See* 12/14/11 at 10:25:01-25:27, 10:28:56-29:57, 10:32:43-34:18, 10:36:22-36:59, 10:39:08-40:18, 14:56:59- 57:47.)

argument as a reason to submit the punitive damage claim to the jury, a tactic diametrically opposed to the government's policy that "more stars equal safer cars." (*Id.*) Improving performance in government-required safety tests and achieving the highest possible occupant safety rating simply cannot and should not—as a matter of law—evidence gross negligence.

Under Kentucky law, the evidence simply did not justify a punitive damages instruction or a punitive damages award against Nissan. Exceeding federal crash-testing standards is compelling evidence of more than "slight care" and is not "outrageous" conduct.

B. Outstanding performance in the federal government's New Car Assessment Program weighs against—not in favor of—punitive damages.[11]

The 2001 Pathfinder not only performed as intended during the crash, it almost certainly saved the life of Amanda Maddox. Her survival is consistent with the fact that the Pathfinder achieved the highest possible NCAP score in frontal impact, front passenger occupant protection—five out of five stars—in frontal crash tests. (VR 12/6/11 at 16:55:16-55:25; 12/7/11 at 13:01:02-01:59.)

Ironically, given plaintiff's striking misuse of these test results, the federal government's goal in creating NCAP was to "improve occupant protection by providing consumers with a measure of the relative safety of passenger vehicles to aid in their purchasing decisions. *As a result of consumer demand*, vehicle manufacturers are encouraged to voluntarily design and produce safer vehicles." *The New Car Assessment Program, Suggested Approaches for Future Program Enhancements,* at 3, DOT HS 810-

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[11] This issue is preserved through Nissan's motions for directed verdict (VR 12/8/11 at 14:56:06-56:28, 15:09:06-13:39; 12/14/11 at 17:22:55-23:20; TR 2347 at pp. 3-7, 17-18) and post-trial motions (TR 2497 and 2538).

698 (January 2007) (www.safercar.gov/staticfiles/safercar/pdf/810698.pdf) (emphasis added).

With respect to frontal impact testing, the NCAP program employs the same test protocol in FMVSS 208, except the NCAP test is conducted at a higher speed. (VR 12/7/11 at 11:40:25-41:20.) Based on performance in NCAP's higher-speed tests, vehicles are comparatively rated on a 5-Star Safety Rating System, and "More Stars" equal "Safer Cars." (*See* www.safercar.gov/Safety+Ratings [last accessed Oct. 6, 2014.])

Yet, the evidence and arguments on Maddox's behalf turned the five-star NCAP rating—and the underlying public policy—on its head. Amanda claimed that the 2001 Pathfinder's uncontested five-star rating for occupant protection represented "stars over safety." (VR 12/15/11 at 14:43:55-46:53.) She claimed that Nissan's pursuit of the highest possible, government-approved safety ratings supposedly rendered the Pathfinder defective and unreasonably dangerous because federal government's test protocol required the use of 50th percentile male test dummies, which, in the process, provided consumers a consistent way of comparing vehicle safety. Yet, because Amanda's body weight placed her at the high end of the Bell curve, the mandatory NCAP test protocol morphed into "evidence" that the Pathfinder's restraint system was defective and unreasonably dangerous. (*Id.* at 14:42:20-46:53.)

Maddox's counsel pushed this concept to its extreme by arguing during the charge conference that Nissan's effort to achieve the highest possible occupant protection rating was justification for instructing the jury on punitive damages. His rationale was that designing a restraint system to achieve the highest NCAP rating is "an improper purpose" since it can lead to selling more vehicles than lower rated competitors. (VR 12/15/11 at

09:44:10-44:23.) Of course, this is exactly why NCAP's more rigorous tests were created by the federal government in the first place.

Maddox's perversion of the federal government's motor vehicle safety standards and NCAP rating system amounted to a bald deception. Building consumer demand for safer vehicles—even safer than the Federal Motor Vehicle Safety Standards require—is NHTSA's public charge. As part of the U.S. Department of Transportation, NHTSA's sole purpose "is to save lives, prevent injuries, and reduce traffic-related health care and other economic costs." *The New Car Assessment Program, Suggested Approaches for Future Program Enhancements* at 3, *supra*. And NCAP works. Looking back over the decades since NCAP's launch, NHTSA says that "NCAP has helped make significant safety improvements" because car companies are "building vehicles that *exceed Federal motor vehicle safety standards.*" (*Id.* at 4, emphasis added.)

Moreover, NCAP cannot be characterized as a "minimum" standard. Testing occupant safety at higher speed—an entirely voluntary act—produces destructive forces one-third higher than testing under FMVSS 208. And even Standard 208, which is mandatory, cannot be called a minimum requirement. As the U.S. Supreme Court said in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 893 (2000)(citing 49 CFR § 571.208, S2 (1998)), "Standard 208 covers 'occupant crash protection.' Its purpose 'is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements . . . [and] equipment requirements for active and passive restraint systems.'" In *Geier,* the Court found that compliance with FMVSS 208 preempted a common law tort claim that a 1987 Honda Accord was defective for failing to employ a "safer" occupant protection system. 529 U.S. at 931-932.

Far from being a basis for liability—much less punitive damages—maximum performance under NCAP should have prompted the trial court to grant Nissan's motion for a directed verdict or, if necessary, Nissan's motion for judgment notwithstanding the verdict. The highest possible safety rating in the federal government's most stringent—and voluntary—testing program is irrefutable evidence of a reasonably safe design.

As a matter of public policy, complying with government safety standards and achieving the highest possible occupant safety rating should rule out any consideration of punitive damages, especially given their "quasi-criminal" nature. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Compliance with government standards—and here, going above and beyond by voluntarily complying with stricter standards to improve the safety of most passengers—is irrefutable evidence of at least "slight" care. Although legal commentators differ as to whether regulatory compliance should be an absolute defense to ordinary negligence, *e.g.*, R. C. Ausness, *The Case for a Strong Regulatory Compliance Defense,* 55 MD. L. REV. 1210 (1996), there can be little dispute that regulatory compliance eliminates claims of "outrageous" or "reprehensible" conduct.[12]

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[12] *Logan v. Cooper Tire & Rubber Co.*, 2011 U.S. Dist. LEXIS 62303 (E.D. Ky. 2011) (compliance with government standards and regulatory testing requirements weighs against a claim for punitive damages); *Clark v. Chrysler Corp.*, 436 F.3d 594, 603 (6th Cir. 2006) (Chrysler's failure to adopt a test developed by GM that was not required by the government, when it was "undisputed that Chrysler complied with federal testing requirements," did not evince "indifference to or reckless disregard for the safety of others"); *Cameron v. DaimlerChryser Corp.*, 2005 U.S. Dist. LEXIS 24361, *25 (E.D. Ky. 2005) (the fact that defendant's design complied with federal safety standards "weighs against punitive damages"); *Stone Man v. Green,* 435 S.E.2d 205, 206 (Ga. 2005) (compliance with "federal regulations is not the type of behavior which supports punitive damages; indeed, punitive damages, the purpose of which is to 'punish, penalize or deter, are, as a general rule, improper where a defendant has adhered to . . . safety regulations"); *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 249 (Mo. 2001) (conformity with the regulatory process" negates the conclusion that the defendant's conduct was tantamount to intentional wrongdoing," thus there was "not a submissible case for

C. The trial court did not correctly apply Kentucky law or follow the U. S. Constitution.[13]

The trial court sensed a lack of evidence supporting a punitive damages instruction. During argument on Nissan's motion for directed verdict, the trial court stated that, "[o]bviously," a "problem here is punitive damages," an issue with which the court had struggled and "continue[d] to struggle." (VR 12/15/11 at 09:48:23-48:30.) The trial court twice commented on the fact that, if it gave an unwarranted punitive damages instruction, it could vacate any such award. (VR 12/15/11 at 9:35:12-35:45; 9:48:45-49:05.)

Despite this struggle and the lack of any evidence justifying submission of punitive damages to the jury, the trial court both instructed on punitive damages and denied the post-trial motion in which Nissan demonstrated that Maddox failed to prove her punitive damage claim. (TR 2347, 2497, 2538, 2640, 2677, 2721, 2735.)

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punitive damages"); *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 608 (Iowa 2000) (compliance with the UL standard showed "a reasonable disagreement over the relative risks and utilities" of the manufacturer's conduct such that "a rational fact finder" could not find clear and convincing proof of "a willful and wanton disregard" by the manufacturer, which meant that the trial court erred in submitting the claim for punitive damages to the jury and in overruling the post-trial motion regarding punitive damages); *Brand v. Mazda Motor Corp.*, 978 F.Supp. 1382, 1394 (D. Kan. 1997) (" a reasonable jury could not find the defendants to have acted in reckless disregard of consumer safety in designing and manufacturing the front occupant protection system" when it complied with FMVSS); *Miles v. Ford Motor Co.*, 922 S.W.2d 572 (Tex. App. 1996), rev'd on other grounds, 967 S.W.2d 377 (Tex. 1998) (car manufacturer's reliance on "governmental agencies charged with administering safety regulations" that the product is not unreasonably dangerous" cannot be said to show "conscious indifference to the safety of the product users" or "a flagrant disregard for the rights of others," and jury's finding of gross negligence was based on insufficient evidence and was unjust); *Sloman v. Tambrands, Inc.*, 841 F. Supp. 699, 703 (D. Md. 1993) (plaintiff failed to prove by clear and convincing evidence that the defendant acted with malice because the defendant successfully proved that it complied with federal regulations); *Chrysler Corp. v. Wolmer,* 499 So. 2d 823 (Fla. 1986) (reversing punitive damages award where alleged injury-causing defect was in compliance with federal standards).

[13] This issue is preserved due to Nissan's tendered jury instructions and argument for its tendered instructions, motions for directed verdict, and motion for judgment notwithstanding the verdict. (TR 1802, 2322, 2347, 2497, and 2538; VR 12/14/11 at 17:14:52-23:40; VR 12/15/11 at 09:31:31-36:22.)

Ruling on Nissan's post-trial motions, the trial court found that a "punitive damages instruction was proper," apparently because it had found "no case or statute which instructs otherwise." (TR 2757 at 14.) The court determined the amount of punitive damages bore a reasonable ratio to the compensatory award and performed a "first-blush" review to determine that the punitive damage award was not "excessive." (*Id.* at 14-15.) The trial court failed, however, to evaluate whether Maddox furnished actual evidence of outrageous conduct as required by Kentucky law. The trial court also failed to evaluate whether Maddox presented evidence of reprehensible conduct as required the U. S. Constitution.

In other words, the trial court looked at the amount of punitive damages, but it did not address Nissan's argument that a punitive damages instruction should not have been given in the first place or that Nissan was entitled to a directed verdict or judgment notwithstanding the verdict due to the lack of evidence of outrageousness or reprehensibility.

D. The Court of Appeals also did not correctly apply Kentucky law or follow the U. S. Constitution.

1. Kentucky law does not allow the imposition of punitive damages when, as here, the defendant exhibits at least slight care.

In affirming the punitive damages award, the Court of Appeals misapplied Kentucky law. Although the majority opinion quotes the definition of "gross negligence" set forth in *Cooper v. Barth*, *supra*, 464 S.W.2d at 234, the opinion fails to identify any evidence of malice, willfulness, outrageousness, or an utter and wanton disregard of the rights of others as required by statute. (Opinion at 21-23.) *See* KRS 411.184(1) and (2). Instead, the court cited *Sufix, U.S.A. v. Cook*, 128 S.W.2d 838 (Ky. App. 2004), for the

generalization that "lack of testing for defects constitutes a proper basis for instructing a jury on punitive damages." (Opinion at 23.)

Sufix is completely inapposite. In *Sufix,* the plaintiff was using a trimmer equipped with pivoting metal blades attached to the shaft by a plastic cap. 128 S.W.3d at 840-41. The first time the plaintiff used the trimmer, the trimmer head shattered, severely lacerating the plaintiff's leg. *Id.* at 840. Testimony at trial demonstrated that "the plastic cap was not strong enough to withstand the normal forces generated by the spinning blades," and "the cap had a tendency to fail." *Id.* at 841. In addition to evidence of defect, the plaintiff presented evidence of outrageous conduct or gross negligence:

(1) although Sufix claimed that it tested the product, "it was unable to substantiate that claim" and "could not document *any* testing";

(2) "its president could not recall whether impact tests had been made" and "the only tests about which Sufix produced evidence were field tests by non-engineers";

(3) Italy rejected the design of the plastic version of the product, "a rejection that should have put Sufix on notice that the plastic version was unsound";

(4) "Sufix produced a stronger metal-capped version in Italy" while distributing the "plastic version in the United States";

(5) "soon after the release of the product Sufix received notice from customers of product failures";

(6) Sufix "inadequately investigated" these customer complaints;

(7) "in a company field test" before plaintiff's injury, "the plastic-capped Pro-Edge head shattered and flung one of its blades, but still the company did not appreciate the defect or recall the product." [*Id.*]

Here, in contrast, Nissan subjected the 2001 Pathfinder to mandatory and voluntary testing using the federal government's protocols and achieved the highest possible safety rating. The proof also demonstrated:

(1) Nissan documented all mandatory tests pursuant to FMVSS 208 as well as the more stringent NCAP tests;

(2) The Pathfinder was subjected to high-speed crash and impact testing, not just field testing;

(3) No one rejected the design of the Pathfinder or its load limiter, and no accidents or claims put Nissan on notice that it was unsound;

(4) Nissan did not produce a "better" version of the Pathfinder's load limiter for other customers or other countries;

(5) Nissan received no complaints from customers of load limiter failures;

(6) Nissan could not "inadequately investigate" customer complaints because complaints were non-existent; and,

(7) No testing before Amanda's injury revealed any defect in the load limiter.

In short, the appellate court's reliance on *Sufix* in the face of these facts is palpable error. The evidence supporting punitive damages in *Sufix* was more than Sufix's failure to test. Due to one country's complete rejection of its design, Sufix was on notice that its product was unsound. Moreover, Sufix produced a safer product for another country; Sufix received but inadequately investigated customer complaints; and, Sufix was on notice that its product failed a field test. It was the failure to perform *any* testing—combined with the other evidence of Sufix's knowledge—that demonstrated a wanton or reckless disregard for safety of others and raised Sufix's conduct from ordinary to gross negligence. Without such knowledge and such wanton or reckless disregard (completely lacking here), the conduct does not rise to the level of gross negligence, and punitive damages may not be awarded.

Nissan did not fail to test the Pathfinder using recognized safety protocols. Rather, it did not—and could not—crash test the Pathfinder using test dummies matching every conceivable passenger size and shape and susceptibility to injury (such as a ruptured gastric bypass) in every conceivable type of crash. Applying a "requirement" conjured for the purposes of one particular lawsuit effectively creates a standard no product manufacturer can ever meet. It is always possible to work backwards from a

specific event to come up with a test that no one performed before the event occurred, and that is exactly what occurred here.

Rationalizing punitive damages against Nissan on the basis of not conducting every conceivable type of crash test violates common sense and erodes the "*unreasonably* dangerous" principle at the heart of Kentucky product liability law. Nissan subjected the Pathfinder to both mandatory and voluntary testing, for which it received NCAP's highest safety rating, and yet this very conduct was fodder for punitive damages. Nissan's actions simply did not "demonstrate a wanton or reckless indifference to the rights [or] safety" of others. (Opinion, Maze, J. dissenting, at 29.) Indeed, "Nissan's compliance with federal regulations and additional voluntary standards show that it exercised at least slight care under the circumstances." (*Id.*) "Although Amanda claim[ed] that Nissan changed its seatbelt design knowing that it was placing occupants heavier than 171 pounds at risk, there was *no* evidence to support this conclusion." (*Id.*, emphasis added.)

Further, to the extent the Court of Appeals majority implies that lack of testing alone provides sufficient evidence to award punitive damages, the panel paints with too broad a brush. *See* Opinion at 23 ("lack of testing for defects constitutes a proper basis for instructing on punitive damages"); *Sufix*, 128 S.W.3d at 842 ("[s]everal courts have held that a manufacturer's failure to test for defects that pose a risk of serious injury and that are susceptible to adequate pre-release testing can amount to a conscious or reckless disregard for the rights and safety of others and thus can justify an award of punitive damages") (citing *Shurr v. A.R. Siegler,* 70 F.Supp.2d 900 (E.D. Wisc. 1999) and *Leichtamer v. American Motors Corp.*, 424 N.E.2d 568 (Ohio 1981)).

The decisions relied upon by the *Sufix* court simply did not hold that lack of testing on its own was sufficient to uphold a punitive damages award. For example, in *Shurr,* the trial court granted in part and denied in part "defendant Crane's motion for partial summary judgment as to punitive damages." 70 F.Supp.2d at 940. It granted the motion as to one of the plaintiff's claims of defects because Crane's affirmative action seeking to reduce danger (even if the action may have been the wrong kind of action or not enough action) was "enough to establish that it did not act with 'reckless indifference to or disregard of the rights or others.'" *Id.* at 937 (citation omitted). Similarly, here, Nissan's introduction of the load limiter, which was itself an energy absorption device to increase safety, coupled with its voluntary testing under the stringent NCAP program, demonstrates that it did not act with reckless indifference.

Drawing all inferences "in plaintiffs' favor as the non-moving parties," the court in *Shurr* denied Crane's motion for summary judgment on another claimed defect, "that Crane *knowingly avoided ever* explosion proof testing the upper vent hole" at issue and that it submitted "false" test reports, which were "*treated as deliberate falsehoods* for purposes of" the summary judgment motion. *Id.* at 937-38 (emphasis added). In addition to knowingly avoiding testing of the vent hole and submitting false test reports, Crane also did not operate a "pump during the explosion proof testing, in direct contravention of the relevant military specifications." *Id.* at 938, n. 31. In other words, "[t]his case did

involve more than just inadequate testing." *Id.* at 938, n.33.[14] "Inferring as" it "must for summary judgment purposes that Crane *knew* that its explosion proof testing was defective and deliberately concealed that knowledge in its" test reports, a "reasonable jury could find that Crane acted with conscious or reckless disregard of others rights." *Id.* at 938.

Here, in stark contrast, Nissan did not avoid, knowingly or otherwise, testing the Pathfinder or the load limiter, nor did it submit false test reports or commit any deliberate falsehoods.

In addition, the court in *Shurr* made clear that the "plaintiffs must eventually provide specific causal evidence linking the explosion proof testing defects they allege with the explosion that occurred." *Id.* at 938. "For summary judgment purposes, I draw the inference in plaintiffs' favor as the non-moving parties that the explosion proof testing, had it been done correctly, would have revealed some of the design defects plaintiffs allege." Here, Amanda never presented evidence that crash testing with a 95th percentile dummy would have revealed the design defects Amanda alleged (or that a load limiter with less webbing payout would not have increased the likelihood that Amanda would have sustained severe chest and thoracic injury).

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[14] Although the court stated that, "[t]o sum up, defective testing alone can justify punitive damages," *id.* at 940, that statement was dicta because, as the court specifically held, the case involved "more than just inadequate testing." Further, every inadequate testing case cited in *Shurr* where punitive damages were found to be permissible involved more than just inadequate testing. For example, the "Wisconsin Supreme Court allows a jury to consider punitive damages based *in part* on inadequate or defective testing." *Id.* at 940, citing *Sharp v. Case Corp.*, 227 Wis. 2d 1, 21, 595 N.W.2d 380 (1999) (emphasis added). "Other states have likewise held that inadequate or defective testing (to be sure, frequently *in conjunction with knowledge of actual defects* and failure to warn customers of known defects) is sufficient to uphold" a punitive damages award. *Id.* at 938-39.

Both *Shurr* and *Sufix* cite the Ohio Supreme Court's opinion in *Leichtamer*, 424 N.E.2d 568. *Sufix*, 128 S.W.3d at 842; *Shurr*, 70 F.Supp. at 939. In *Leichtamer,* the plaintiffs were severely injured when the Jeep in which they were passengers pitched over (with the back end coming up over the front end) landing upside down while the driver was negotiating a double-terrace hill at an off-road recreation facility. The jury was instructed that it could award punitive damages if the plaintiff proved "by a preponderance of the evidence [as opposed to Kentucky's clear and convincing evidence] that these defendants *knew* that the design of [the Jeep's] rollbar and its support created a grave danger to its customers and that the defendant's failure to redesign the rollbar and its support structure was intentional, reckless, wanton, willful or gross conduct." 424 N.E.2d at 578-79. In affirming a punitive damages award, the court noted that the appellants "took *no* steps to ascertain the safety of the roll bar device on the 1976 Jeep"; "no 'proving ground' tests, 'vibration or shock' tests, or 'crash' tests were performed on a 1976 Jeep vehicle equipped with roll bar assemblies. *Id.* at 580. In addition to this complete lack of testing, Jeep's "commercial advertising clearly contemplates off-the road use of the vehicle." The salesman's guide described the roll bar: "Surround yourself and your passengers with the strength of a rugged, reinforced steel roll bar for added protection. A very practical item, and a must if you run competition with a 4WD club. Adds rugged good looks too." *Id.* It was the combination of the "foreseeability of roll-overs and pitch-overs, the failure of appellants to test to determine whether the roll bar 'added protection,'" and the encouragement of "off-the road use while providing a roll bar that did little more than add 'rugged good looks'" that provided "a sufficient basis for an award of punitive damages.

Here, in contrast, Nissan specifically tested the Pathfinder and the load limiter. By increasing webbing payout, the load limiter is designed to reduce the high chest loads that shoulder-to-hip belts can impart during frontal crashes, particularly when the crash is severe and the passenger is heavier, thus lessening chest and thoracic injuries in frontal crashes. (VR 12/7/11 at 12:29:09-40:54.) And, unlike the circumstances in *Leichtamer*, Amanda never suggested or implied that Nissan encouraged misuse of the Pathfinder.

"Although not a product liability suit," the court in *Shurr* found an opinion from the Missouri Supreme Court, *Hoover's Dairy, Inc., v. Mid-America Dairymen, Inc./Special Products, Inc.*, 700 S.W.2d 426, 436 (Mo. 1985), "helpful." *Shurr*, 70 F.Supp. 2d at 939. In *Hoover's Dairy*, the court reversed an award of punitive damages because there was "no evidence in the record that . . . the appellants *knew or had reason to know* that their claimed negligent acts posed an unreasonable risk that was highly probable to result in substantial injury to respondent." 700 S.W.2d at 436 (emphasis added). "[P]unitive damages can be awarded in a negligence action but only when the defendant knew or had reason to know that there was a high degree of probability that the action would result in injury." *Id.* (emphasis omitted). Analogizing to a mechanic who fails to test a car's brakes, the court explained that, while the mechanic may be negligent, he is not liable for punitive damages unless it is shown that he "knew or had reason to know that the brakes were faulty and thus a substantial likelihood existed that the brakes would fail and result in great bodily harm. Such is the critical difference between negligence in order to establish liability and reckless conduct which would justify a punitive damage award." *Id.*

Another opinion cited by *Shurr* is the Minnesota Supreme Court's opinion in *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980). In *Gryc,* a 4-year old child's flannelette pajamas caught on fire when she reached across an electric stove to shut off a timer. *Id.* at 729. The manufacturer argued that its compliance with the federal Flammable Fabrics Act (including passing a certain flammability test) precluded, "as a matter of law, a finding of that guilty state of mind which is a necessary prerequisite to a punitive damages award." *Id.* at 733. At trial, however, it "was proven almost conclusively" that the test "did not and could not properly determine the flammability of fabrics such as cotton flannelette. Moreover, it was almost conclusively established" that the manufacturer "knew not only that the test was invalid but that it could not evaluate the flammability of its products." *Id.* "Furthermore, there was evidence that the test was adopted as a result of industry influence and, therefore, served to protect the textile industry rather than the public." *Id.* at 734. The manufacturer "was aware that unreasonably dangerous fabrics passed the test." *Id.* In addition to the known problems with the testing, the manufacturer "knew that persons were suffering severe burn injuries when [its] flannelette ignited." *Id.* Indeed, as early as 1956, one of the manufacturer's top officials sent the head of research a memorandum entitled "Flammability – Liability" that listed a number of clothing fires and consequent injuries and "stated that the company was sitting on a 'powder keg' with respect to flammability of their flannelette." *Id.* at 734, 740. The manufacturer "was also on notice that approximately 6 lawsuits were brought against it for accidents involving its flannelette. *Id.* at 740. In instructing the jury, the court listed a number of factors "which the jury was to take into account in determining whether [the manufacturer] had acted in willful or reckless disregard of

plaintiff's rights." *Id.* at 739. Among those factors was "the manufacturer's awareness of the danger, the magnitude of the danger, and the availability of a feasible remedy." *Id.*

Once again, the evidence against Nissan comes nowhere near the evidence supporting punitive damages in *Gryc*. No evidence suggested that the extensive mandatory and voluntary tests prescribed by federal safety regulations were invalid—obviously, they are not—or that Nissan or anyone else knew the testing to be invalid. Nor was there any evidence that the testing fails to serve the public. Nor was there any evidence that Nissan knew that its load limiter had caused injuries or that any similar lawsuits had been brought against Nissan. And there was no evidence that Nissan was aware of a feasible remedy—or that Amanda produced evidence of a feasible remedy.[15]

The evidence here simply fails to satisfy Kentucky requirements for instruction on or imposition of any punitive damages. Allowing punitive damages when there is no evidence demonstrating malice or wanton disregard "would effectively eliminate the distinction between ordinary and gross negligence" in product liability cases. *Kinney*, 131 S.W.3d at 359.

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[15] Although Amanda's technical witnesses criticized various components of the Pathfinder's restraint system and cherry picked examples of specific components from other cars (*e.g.*, retractors from 1996-1999 without load limiters, or the Volvo load limiter with less payout, or the latch plate on the Chrysler Sebring, or a Saab seat), no one identified a specific design in existence in or before 2001 that would have prevented Maddox's injuries. Nor did plaintiff's witnesses offer any proof that they tested any bits and pieces from other cars or explain how they would work together, despite admitting that seat belt components must be considered as one system. (VR 12/6/11 at 15:23:42-24:05.) As the trial court admitted, it is altogether "unclear" that the plaintiff proved the existence of a feasible, alternative design. (TR 2757 at 16.) And even if Amanda proved the existence of a feasible design (she did not), that there "may have been a safer design, while relevant to the plaintiffs' products-liability claim, does not prove their entitlement to punitive damages." *Hinkle v Ford*, 2012 WL 3913089, 2012 U.S. Dist. LEXIS 127302, *9 (E.D. Ky. 2012).

2. Due Process prohibits punitive damages when the defendant's conduct is not reprehensible.

Even if state law allows punitive damages in a given case, those punitive damages must pass muster under federal law. While states possess a certain amount of discretion in determining which conduct to deter with punitive damages, if punitive damages are imposed they cannot violate the Due Process Clause of the Fourteenth Amendment. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1995); *State Farm Mutual Automobile Insurance Company v. Campbell,* 538 U.S. 408, 416 (2003). "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of a penalty that a State may impose." *BMW*, 517 U.S. at 574.

The United States uses three criteria to determine whether a punitive damages award allowed by state law violates the federal constitution: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive damages award to the compensatory award; and (3) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. *State Farm,* 528 U.S. at 418-19; *BMW*, 517 U.S. at 575-77. Of these factors, the most important is the degree of reprehensibility of the defendant's conduct. *Id.*

In determining the degree of reprehensibility, the Supreme Court has "instructed courts" to consider whether: "[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm*, 538 U.S. at 419.

"The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.*

Here, only the first factor (physical as opposed to economic harm) is present; none of the other factors apply. Far from evincing an indifference to the safety of others, Nissan provided a variety of safety features in the Pathfinder and subjected itself to more stringent testing than required to improve safety for the greatest number of passengers. Amanda was not financially vulnerable, and Pathfinders are not targeted to the financially vulnerable. The record is devoid of similar claims or suits involving the Pathfinder, making this accident an isolated incident. Finally, the record contains no evidence of "intentional malice, trickery, or deceit." Just as "nonviolent crimes are less serious than crimes marked by violence, . . . 'trickery and deceit' . . . are more reprehensible than negligence." *BMW*, 517 U.S. at 576 (citations omitted).

Even assuming that crash testing with a 95th percentile dummy would have demonstrated problems with the load limiter that could have been fixed without putting lighter weight passengers at risk, or without putting heavier passengers at risk for increased chest and thoracic injuries,[16] failure to perform such a test does not indicate reprehensibility. In *Clark v. Chrysler Corp.*, 436 F.3d 594, 603 (6th Cir. 2006), GM developed and used a test that no other auto manufacturers used. "In response, NHTSA conducted an evaluation of the GM test to determine whether the government should

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[16] Amanda placed no evidence in the record regarding what 95th percentile crash testing would have shown and whether it might have led to a feasible alternate design that would have lessened Amanda's abdominal injuries without increasing her chest and thoracic injuries. Nor did she place any evidence in the record that changes that would have possibly decreased her abdominal injuries in her specific crash would not have decreased the safety of passengers at the other end or the middle of the Bell curve.

reckless disregard for life or safety. Under the Court of Appeal's application of the factor, any manufacturer of any product is subject to punitive damages if, in some form or fashion, the product exposes the user to risk. Manufacturers are not, however, required to make products that never expose persons to risk. *See United States v. General Motors Corp.*, 518 F.2d 420, 435-436 (D.C. Cir. 1975) ("manufacturers are not required to design vehicles or components that never fail").

The Court also found that the "repeated conduct" reprehensibility factor supported a punitive damage award because every time "Nissan manufactured a Pathfinder with the load limiter, it repeated the conduct." (Opinion at 23.) This misapplication of the repeated-conduct factor exposes to punitive damages any defendant manufacturing thousands of virtually identical products if just one product causes injury on one occasion.

Finally, without any explanation and in a finding not supported by the trial record, the Court found "trickery or deceit" in Nissan's effort to design the Pathfinder to perform well on NCAP's tests geared to the 50th percentile body size. (Opinion at 23-24.[17]) With this holding, the Court of Appeals eliminated the need for clear and convincing evidence of gross negligence. Instead, punitive damages are now available if a provably safe product with the highest safety rating obtainable cannot physically meet every user's needs in every circumstance imaginable.

Neither trickery nor deceit is present in this case. Trickery and deceit are synonyms for "the act of intentionally giving a false impression." BLACK'S LAW

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[17] Although the opinion states that "*BMW* recites 'mere negligence' as a factor" (Opinion at 24), that case does not contain the phrase "mere negligence" or even the word "mere." 517 U.S. at 559. *State Farm* also does not use the term "mere negligence," although it does refer to "mere accident" as a contrast to "intentional malice, trickery, or deceit." *State Farm*, 538 U.S. at 419.

DICTIONARY 413 (7th ed. 1999). In *BMW*, there was an absence of "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive." *BMW*, 514 U.S. at 579. After *BMW*, the Court added the factor of malice, trickery, or deceit, which it found was present when the company altered records and engaged in acts that amplified plaintiffs' harm. *State Farm*, 528 U.S. at 419-420. Even when there is evidence that a manufacturer knew a design was weak and no other trickery or deceit was present, the court's assessment of that factor for analysis of reprehensibility was neutral. *Clark*, 436 F.3d at 605. Here, neither trickery nor deceit is present nor did Nissan know any information regarding a possible design defect, weighing this reprehensibility factor in Nissan's favor.

CONCLUSION

As a conscientious corporate citizen, Nissan applied thoughtful consideration, real world data, and good engineering judgment in designing the 2001 Pathfinder. As a matter of public policy, punitive damages should not be available when the allegedly defective product meets both mandatory and more stringent, voluntary safety standards.

Public policy aside, plaintiff did not produce clear and convincing evidence of gross negligence. Kentucky law requires a culpable state of mind for punitive damages, and that culpable state of mind must be proven by clear and convincing evidence. Even taking the facts in the light most favorable to plaintiff, her evidence amounted to a disagreement over how to design a product and the design trade-offs inherent in that process. Amanda and her witnesses believed the design should have protected this particular plaintiff in this particular crash, whereas Nissan and its engineers believed the design should protect the greatest number of occupants in the greatest number of crashes.

As this Court recognized in *Ulrich v. Kasco Abrasives Co.*, 532 S.W.2d 197, 201 (Ky. 1976), "[t]here is a limit beyond which the manufacturer simply cannot as a practical matter be expected to go."

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